UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONDITIONED AIR SYSTEMS, INC.

Case No. 5-CA-79299

and

PLUMBERS AND GAS FITTERS LOCAL UNION NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

*Patrick J. Cullen, Esq.*
for the General Counsel.
*Richard Putnam, Pro Se*
for the Respondent.
*Francis Martorana, Esq. (O'Donoghue and O'Donoghue, LLP)*
*Washington, D.C.*
for the Charging Party.

# DECISION

## STATEMENT OF THE CASE

ARTHUR J.AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland on September 6, 2012. The Charging Party, Plumbers and Gas Fitters Local Union No. 5 filed the charge giving rise to this matter on April 20, 2012. The General Counsel issued a complaint on July 24, 2012, and an amended complaint on August 21. The General Counsel alleges that Respondent has been violating Section 8(a)(5) and (1) of the Act since March 22, 2012, by failing and refusing to furnish the Union information it requested in a letter dated March 21 but mailed on March 22.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, Conditioned Air Systems, Inc., a corporation, is a plumbing contractor with an office in Frederick, Maryland. In the twelve months prior to the filing of the charge, Respondent performed services valued in excess of $50,000 outside of the State of Maryland. I

find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The Union reached a collective bargaining agreement with the Mechanical Contractors Association of Metropolitan Washington, Inc. (the Association) that was effective from August 1, 2007 through July 31, 2010. On September 22, 2008, Virginia Merrigan, Respondent's Secretary-Treasurer, signed a letter of assent. That letter authorized the Association to be Respondent's authorized collective bargaining representative for matters contained in or pertaining to the Association's 2007-2010 collective bargaining agreement with Local 5. The letter stated,

> In signing this letter of assent, the undersigned firm (Employer) does hereby authorize the Mechanical Contractors Association of Metropolitan Washington (hereinafter called "the Association") as its collective bargaining representative for all matters contained in or pertaining to the current ***or subsequently negotiated labor agreements*** between the Association and Plumbers Local Union No. 5, United Association (hereinafter called "the Union")…This letter shall become effective on 9-22-08. It shall remain in effect until terminated by the undersigned employer giving written notice to the Association and the Union at least one hundred fifty (150) days prior to the then-current expiration date of the labor agreement between the Union and the Association (emphasis added).

The Union and the Association entered into a subsequent collective bargaining agreement on about July 23, 2010, which is effective from August 1, 2010 to July 31, 2014. On July 29, 2010, the Union sent Respondent a letter regarding the new four-year agreement. The letter stated:

> Enclosed are two (2) copies of the Assent Letter that must be signed by each of our contractors. For your convenience, two signed copies are enclosed. We ask you to sign both; keep one for your files and mail the other back to the Local Union on or before August 13, 2010.

Respondent did not sign and/or return the Assent Letter.

On May 9, 2011, the Union sent Respondent another letter noting that it had not returned a signed copy of the Letter of Assent. This letter stated,

> **This is our third and final attempt to obtain a signed copy of the Letter of Assent from you.**
>
> If we do not receive your signed Letter of Assent in this office by the close of business on May 18, 2011 this matter will be turned over to our attorneys, O'Donoghue and O'Donohue, L.L.C. In that event, your Union represented employees may be pulled from work…

Respondent did not return the Letter of Assent but paid employees pursuant to the terms of the collective bargaining agreement through March 2012. Additionally, Respondent reported to the Union whenever it hired or terminated employees.

Respondent also made payments to the Union's various benefit funds. However, it fell behind in making the payments required by the collective bargaining agreement. The trustees of the Union's benefit funds sued Respondent in Federal District Court. On December 14, 2010, Respondent entered into a settlement of that suit with the trustees of the benefit funds. It initially complied with the terms of the settlement and then fell behind again in making the payments required by the agreement.

In about December 2011, a union member reported to Union Business Manager James Killeen that Respondent was using non-union labor on a job at the Northern Virginia Community College. Respondent's President, Richard Putnam, acknowledged that he was using non-union labor to Killeen and Joseph Savia, a representative of Steamfitters Local Union 602, in a meeting that December.

Another union member reported to Killeen that Respondent had started another company called Complete Air Solutions ("Solutions") which was using trucks with the name Conditioned Air Systems ("Systems") still painted on them.[1] In January 2012, Whiting-Turner, the general contractor at the Northern Virginia Community College, entered into a subcontract with "Solutions."

On March 22, 2012, the Union mailed Respondent the letter which is the subject of this case. The letter stated that Local 5 was concerned that bargaining unit work was being transferred to employees of "Solutions" to avoid System's obligations under the collective bargaining agreement between the Union and the Mechanical Contractors Association. The letter, written by James Killeen, also stated that the Union had information supporting the conclusion that "Solutions" was an alter ego or disguised continuance of "Systems."

This letter asked Richard Putnam to describe his relationship with "Solutions" and to identify the owners and officers of "Solutions" and "Systems." Next the letter asked Putnam to identify all jobs, including service contracts on which either company was working as of December 31, 2011 and March 21, 2012. The Union asked Putnam to identify all jobs initially awarded to "Systems" that were transferred or subcontracted to "Solutions," and to provide documentation showing the circumstances of any such job transfers.

The Union's letter asked questions regarding the identity of the employees of both companies. It also inquired regarding "Systems" equipment that was used, borrowed, sold or otherwise transferred to "Solutions" and a description of relevant transactions. The Union asked Putnam to identify all equipment or vehicles owned by "Solutions."

Other questions posed by the Union concerned the consideration given by "Solutions" to "Systems," licenses held by each company, hours worked by "Solutions" employees, the

[1] I find that "Solutions" and "Systems" is a less confusing way to distinguish between the two companies than "Conditioned" and "Complete."

principal payroll preparer of each company, the health insurance carrier for each company's non-union employees, transfers of funds from "Systems" to "Solutions," and loans or lines of credit.

Respondent did not provide any of this information and did not contact the Union to try to negotiate any accommodation regarding these requests.

*Analysis*

Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain with the representative of its employees. An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative for contract negotiations or administration, *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152-53 (1956). Information pertaining to employees in the bargaining unit is presumptively relevant, *Southern California Gas Co.,* 344 NLRB 231, 235 (2005). An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature Inc.,* 334 NLRB 880, 885 (2001).[2]

If an employer has a claim that some of the information requested is confidential or unduly burdensome to produce, such claims must be made in a timely fashion, *Detroit Newspaper Agency,* 317 NLRB 1071, 1072 (1995). The reason a confidentiality claim must be timely raised is so that the parties can attempt to seek an accommodation of the employer's confidentiality concerns, *Tritac Corp.,* 286 NLRB 522 (1987). The same is true with respect to a claim that satisfying the request would be unduly burdensome, *Honda of Hollywood,* 314 NLRB 443, 450-51 (1994); *Pet Dairy,* 345 NLRB 1222, 1223 (2005)[3].

If an employer declines to supply relevant information on the grounds that it would be unduly burdensome to do so, the employer must not only timely raise this objection with the union, but also must substantiate its defense. Respondent has done neither. Respondent never advised the union that its request was unduly burdensome, and never sought clarification from the union in order to narrow the request, *Pulaski Construction Co.,* 345 NLRB 931, 937 (2005). There is no doubt that production of the information may impose strains on an employer, but that consideration does not outweigh the union's right to the information requested. *H.J. Scheirich Co.,* 300 NLRB 687, 689 (1990).

When union requests information relating to an alleged single-employer or alter-ego relationship, the union bears the burden of establishing the relevance of the requested information. *Reiss Viking*, 312 NLRB 622, 625 (1993); *Bentley-Jost Electric Corp.*, 283 NLRB 564, 568 (1987), citing *Walter N. Yoder & Sons*, 754 F.2d 531, 536 (4th Cir. 1985). A union cannot meet its burden based on a mere suspicion that an alter-ego or single-employer relationship exists; it must have an objective, factual basis for believing that the relationship exists. See *M. Scher & Son, Inc.*, 286 NLRB 688, 691 (1987). Under current Board law, however, the union is not obligated to disclose those facts to the employer at the time of the information request. *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994); *Corson & Gruman*, 278

[2] This case has also been cited under the name of *Amersig Graphics, Inc.*

[3] Also cited as *Land-O-Sun Dairie*s.

NLRB 329, 333–334 fn. 3 (1986). Rather, it is sufficient that the General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief.

If the Union had a reasonable objective basis for believing that an alter ego relationship existed between Respondent and "Solutions", it is entitled to the information it requested, *Cannelton Industries,* 339 NLRB 996 (2003);[4]*Contract Flooring Systems, Inc.,* 344 NLRB No. 117 (2005); Z-Bro, Inc., 300 NLRB 87, 90 (1990). Several months prior to the March 22, 2010 information request, Respondent admitted to the Union that it was employing non-union labor at the Northern Virginia Community College, Tr. 18-19, 53. Union members reported to James Killeen that these employees were working for Solutions, rather than for Systems. They also provided Killeen with documents indicating that Whiting-Turner, the general contractor, had shifted work from Systems to Solutions. I thus find that the Union had a reasonable belief that Respondent was avoiding its obligations under the collective bargaining agreement by operating Solutions as an alter-ego. As a result I find that the General Counsel and Union have met their burden under the Board and Third Circuit tests and that therefore the Union is entitled to the information it requested in March 2012 regarding the relationship between Solutions and Systems.

*Did Respondent have any contractual obligations to the Union?*

Respondent argues that it had no contractual relationship with the Union on two bases: first, that Virginia Merrigan did not have authority to bind Respondent by signing the letter of assent in 2008; second, that the Union's demands that it sign new letters of assent in 2010 and 2011 establish that the 2008 document no longer bound Respondent.

[4] Current Board law does not require the Union to disclose, at the time of its information request, the facts which cause it to suspect an alter-ego or single employer relationship exists. The United States Court of Appeals for the Third Circuit, however, generally does require the Union to disclose sufficient facts to the employer at the time of any information request to demonstrate its claim of relevance, *Hertz Corp. v. N.L.R.B,* 105 F. 3d 868 (3d Cir. 1997). However, the Court made clear that a union does not have to communicate the facts justifying its request in situations where the employer already is aware of such facts:

> In some situations, a union's reasons for suspecting that discrimination is occurring will be readily apparent. When it is clear that the employer should have known the reason for the union's request for information, a specific communication of the facts underlying the request may not be necessary. As the ALJ noted in this case, two of Hertz's managers testified credibly that they had no idea why the Union believed that Hertz's hiring practices might be discriminatory until they arrived at the administrative hearing…
>
> 105 F.3d at 874.

In the instant case, both tests have been satisfied. The Union's March 21 letter apprised Respondent of the reasons it suspected that "Solutions" was an alter ego. Moreover, Richard Putnam was aware of the circumstances giving rise to these suspicions.

Despite Respondent's contentions, Virginia Merrigan was clearly an agent of Respondent and thus bound Respondent to the Union's contract with the Mechanical Contractor's Association. Board law regarding the principles of agency is set forth and summarized in its decision in *Pan-Oston Co.,* 336 NLRB 305 (2001). The Board applies common law principles in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause a third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.

Respondent allowed Virginia Merrigan to represent it in many of its interactions with the Union. According to Richard Putnam, Merrigan was Respondent's Secretary/Treasurer. Putnam never advised the Union as to any restrictions on Merrigan's authority. Moreover, he ratified her conduct in signing the letter of assent by abiding with the terms of the Union's collective bargaining agreement with the Mechanical Contractor's Association, as well as by his failure to repudiate her conduct, *Service Employees Local 87 (West Bay Maintenance)* 291 NLRB 82, 83 (1988), *One Stop Kosher Supermarket, Inc.,* 355 NLRB No. 201 (2010), slip opinion at 5-6.

The Union insisted in its 2010 and 2011 letters to Respondent that it sign new letters of assent. However, Board law makes it clear that Respondent was bound to the 2010-2014 collective bargaining agreement by virtue of signing the letter of assent in 2008. This is so because it failed to provide the Union and the Association notice of its desire to terminate its relationship with both at least 150 days prior to the expiration of the August 1, 2007-July 31, 2010 collective bargaining agreement, *Malik Roofing Corp.,* 338 NLRB 930 (2003); *Rome Electrical Systems,* 349 NLRB 745 , 747 (2007). Whether or not Respondent signed additional letters of assent, as demanded by the Union, is irrelevant. Respondent was bound by its failure to timely withdraw its authorization of the Association to collectively bargain with the Union, *Carr Finishing Specialties, Inc.,* 358 NLRB No. 165 (September 28, 2012).

## CONCLUSIONS OF LAW

Respondent has violated and continues to violate Section 8(a)((5) and (1) by failing and refusing to provide the Union with the information it requested on March 22, 2012.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Conditioned Air Systems, Frederick, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain good faith with the Union, Plumbers and Gas Fitters Local Union No. 5, including failing to provide the Union in a timely matter with information that is relevant and necessary to the Union's performance of its duties as the exclusive collective bargaining representative of all employees described in Article II of the most recent Collective Bargaining Agreement between the Mechanical Contractors Association of Metropolitan Washington and Local 5, including the information the Union requested on March 22, 2012.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the information it requested on March 22, 2012.

(b) Within 14 days after service by the Region, post at its Frederick, Maryland offices copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 22, 2012.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

6 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 26, 2012.

_____
Arthur J. Amchan
Administrative Law Judge

**APPENDIX**

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide Plumbers and Gas Fitters Local No. 5, United Association with information that is relevant and necessary to the Union's performance of its duties as the exclusive collective bargaining representative of all employees described in Article II of the most recent Collective Bargaining Agreement between the Mechanical Contractors Association of Metropolitan Washington and Local 5, including the information the Union requested on March 22, 2012.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the information it requested on March 22, 2012 pertaining to the relationship between Conditioned Air Systems, Inc. and Complete Air Solutions.

CONDITIONED AIR SYSTEMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
The Appraisers Store Building, 103 S. Gay Street, 8th Floor, Baltimore, MD 21202-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.